



February 29, 2000

Mr. Paul Sarahan, Director
Litigation Division
Texas Natural Resources Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR2000-0776

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 133091.

The Texas Natural Resources Conservation Commission ("TNRCC") received a request for all TNRCC records related to the West Texas Gas, Inc., facility located on U.S. Highway 67, 7 miles east of Big Lake, in Reagan County, Texas. You have released some responsive information to the requestor. You have provided for our review a representative sample of additional responsive information, marked as enclosures 2 through 6. You assert this information is excepted from public disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have reviewed the information you have submitted and considered the exceptions you assert.¹

In relevant part, section 552.103 excepts from disclosure information:

[R]elating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

¹In reaching our conclusion here, we assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988); 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that information submitted to this office.

[Information is excepted from disclosure] only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. Section 552.103(a) was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that section 552.103(a) is applicable, TNRCC must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). You do not indicate that litigation is pending. To demonstrate that litigation is reasonably anticipated, TNRCC must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). You state:

TNRCC has a pending enforcement action against West Texas Gas with regard to violations at its Reagan County facility. This enforcement case was formally referred to enforcement by the San Angelo Regional Office in November 1998 and is currently being investigated and documents are being prepared by the TNRCC's Litigation Division attorneys in anticipation of filing an "Executive Director's Preliminary Report and Petition" in the near future.

We agree that litigation is reasonably anticipated in this instance. Upon review of the submitted information, we additionally find that the information relates to the anticipated litigation. We thus determine you may withhold the information pursuant to section 552.103, except as otherwise noted herein. We also remind you that the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

If the opposing party in the anticipated litigation has seen or had access to any of the information at issue, there is no section 552.103(a) interest in withholding such information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, as to any responsive information to which the opposing party has seen or had access, such information is not excepted from disclosure by section 552.103. We note that enclosures 5 and 6 contain documents that appear to have been provided to TNRCC by the opposing party, as well as

documents to which the opposing party appears to have had access.² We have marked these documents with red flags.³ You represent to this office that some of these documents contain handwritten notes made by TNRCC attorneys. To the extent that the opposing party has had access to the information on these documents, such information is not excepted from disclosure. Therefore, if the opposing party has *not* seen or had access to the handwritten notes, you may redact this information from the documents prior to their release. Because section 552.103 is dispositive, we do not address your section 552.107 and 552.111 assertions.⁴

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

²As to enclosures 5 and 6, you do not assert sections 552.107 or 552.111.

³We note that two of the documents at issue in enclosure 6 are meeting sign-in sheets signed by the requestor and his attorney. This information, as well as any other of the submitted information to which the opposing party has seen or had access, is not excepted from disclosure by section 552.103.

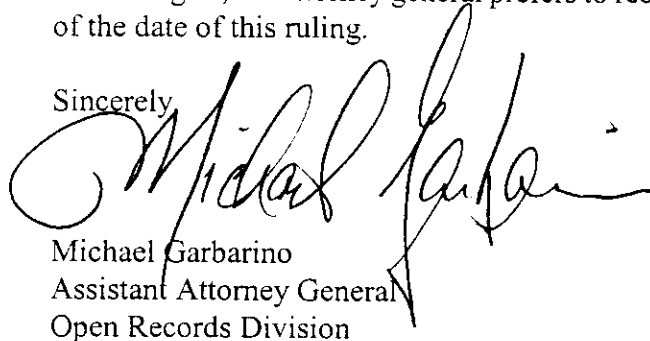
⁴We caution, however, that some of the information may be confidential by law or may implicate the proprietary interest of a third party. Therefore, if TNRCC receives a request in the future, at a time when litigation is no longer reasonably anticipated or pending, the department should seek a ruling from this office on the other exceptions raised before releasing any of the requested information. See Gov't Code § 552.352 (distribution of confidential information may constitute criminal offense).

that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/jc

Ref: ID# 133091

Encl. Submitted documents

cc: Mr. Dan Alrey
Project Geologist
Ranger Environmental Services, Inc.
P.O. Box 201179
Austin, Texas 78720
(w/o enclosures)